

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jul 05, 2016

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

JAVIER LOPEZ-SANTOS,
a/k/a Arnulfo Gomez Mendez,

Defendant.

No. 2:02-CR-02202-RHW-1
Civil No. 2:16-CV-240-RHW

**ORDER DENYING MOTION TO
SET ASIDE, VACATE OR
CORRECT SENTENCE UNDER 28
U.S.C. § 2255**

Before the Court is Defendant's Motion to Set Aside, Vacate or Correct Sentence under 28 U.S.C. § 2255 pursuant to *Johnson v. United States*, 135 S. Ct. 2551 (2015). ECF No. 69. Defendant challenges his sentence of 188 months for a conviction for Conspiracy to Distribute Over 100 Grams of Heroin. *Id.*

Defendant previously filed a Motion to Set Aside, Vacate or Correct Sentence under 28 U.S.C. § 2255 on February 8, 2011. ECF No. 60. The Court dismissed the motion with prejudice for lack of timeliness. ECF No. 61. Defendant did not appeal the dismissal.

A habeas petition is successive if it raises claims that were or could have been adjudicated on the merits. *Woods v. Carey*, 525 F.3d 886, 888 (9th Cir. 2008) (citing *Cooper v. Calderon*, 274 F.3d 1270, 1273 (9th Cir. 2001)). The dismissal of a habeas petition as untimely is considered a disposition on the merits and a future

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1 challenge of the same conviction would be a successive § 2255. *McNabb v. Yates*,
2 576 F.3d 1028, 1029. Accordingly, the instant motion is a successive §2255.

3 Before a successive § 2255 petition may be filed in the district court, the
4 petitioner must move the appropriate court of appeals to authorize the district court
5 to consider the application. 28 U.S.C. § 2244(3)(A). The Court cannot find
6 evidence that Defendant has sought, or that the Ninth Circuit has granted,
7 authorization that would allow this Court to consider Defendant's successive §
8 2255. Thus, this Court lacks jurisdiction to consider Defendant's motion, and the
9 petition must be dismissed.

10 Accordingly, **IT IS HEREBY ORDERED:**

11 1. Defendant's Motion to Set Aside, Vacate or Correct Sentence under 28
12 U.S.C. § 2255 in light *Johnson v. United States*, 135 S.Ct. 2551 (2015), **ECF No.**
13 **69**, is **DENIED**.

14 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
15 Order and forward copies to counsel, Defendant *at his prison address*, and **close**
16 **the file.**

17 **DATED** this 5th day of July, 2016.

18
19 s/Robert H. Whaley
20 ROBERT H. WHALEY
21 Senior United States District Judge
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